Articles

The Autonomy of EU Law, Legal Theory and European Integration

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On Metaphor and Meaning: The Autonomy of EU Legal Order Through the Lens of Project and System

Jacob van de Beeten*

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Abstract: This *Article* examines the understanding of EU legal order that underpins the concept of the autonomy of EU legal order. Building on the work of the American constitutional scholar Paul Kahn, this *Article* argues that the EU legal order can be understood as either *project* or *system*. From the perspective of *project*, the autonomy of EU legal order is the necessary means to realise the values and objectives the EU pursues, but from the perspective of *system*, the autonomy of EU legal order is an end in itself. By making this tension explicit, this *Article* hopes to cast doubt on the claim that autonomy operates in complete harmony with the *telos* the EU pursues and the *ethos* on which it is founded. Autonomy will only express a *telos* or *ethos* if these align with the preservation of the systemic integrity of the EU legal order. There thus exist no *necessary* relationship between the autonomy of the EU legal order and the objectives and values it pursues, but only a *contingent* one.

Keywords: autonomy – Court of Justice – cultural study of law – metaphor – monism – immanent principle.

* PhD Candidate, London School of Economics, j.j.van-de-beeten@lse.ac.uk.

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I. Introduction

The concept of the "autonomy of EU legal order" is somewhat of an enigma. Legal scholars have described the autonomy as "nebulous"[1], as being marked by "considerable ambiguity, if not vagueness"[2] and as a "systemic, ever-changing principle" whose further operation is likely to remain "hard to fathom".[3] Given the difficulties to pin down the meaning of autonomy, it has even been suggested to give up a doctrinal analysis of autonomy altogether and instead conceive of autonomy as a "shapeshifter" that either morphs into a shield protecting EU law from external interference or allows EU law to embrace international law depending on policy considerations.[4] On such a reading, autonomy is not really a legal concept at all.

Rather than relying on a doctrinal or realist analysis, this *Article* asks how the EU legal order is discursively framed and imagined through the concept of autonomy. Building on the recent work of the constitutional scholar Paul Kahn[5], this *Article* argues the EU legal order can be understood as either *project* or *system*. From the perspective of *project*, the autonomy of EU legal order is the necessary means to realise the values and objectives the EU pursues, but from the perspective of *system*, the autonomy of EU legal order is an end in itself. These perspectives are not complementary, but ultimately incommensurable. By making this tension explicit, this *Article* aims to cast doubt on the claim that autonomy operates in harmony with the objectives and the values of the EU. This *Article* instead suggests there is a tension between the institutional and substantive dimensions of EU legal order. The case law of the European Court of Justice (ECJ) shows that a commitment to the EU legal order as a system precedes and underpins an understanding of the EU legal order as a project. This means that the concept of autonomy of EU legal order will only express a more substantive value if such a value aligns with the preservation of the systemic integrity of the EU legal order.

The first part of this *Article* outlines the imageries of project and system – two terms developed by the scholar Paul Kahn (section II). Next, this *Article* shows how project and system offer competing understandings of EU legal order and how the concept of autonomy can be conceptualised as the immanent principle of EU legal order (section III). Finally, it is argued that attempts to conceptualise autonomy as a substantive, value-

[1] C Contartese, 'The Autonomy of the EU Legal Order in the ECJ's External Relations Case Law: From the "Essential" to the "Specific" Characteristics of the Union and Back Again' (2017) CMLRev 1627.

[2] P Koutrakos, 'The Anatomy of Autonomy: Themes and Perspectives on an Elusive Principle' (2019) ECB Legal conference, 92.

[3] M Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) ELR 815, 829.

[4] S Gáspár Szilágyi, 'Between Fiction and Reality. The External Autonomy of EU Law as a "Shapeshifter" after Opinion 1/17' (2021) European Papers www.europeanpapers.eu 675.

[5] P Kahn, *Origins of Order: Project and System in the American Legal Imagination* (Yale University Press 2019). For a general introduction to Kahn's methodological commitments, see P Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press 1999).

loaden concept are limited by the fact that in EU law *system* precedes *project*. Autonomy will only express a more substantive value if such a value aligns with the preservation of the systemic integrity of the EU legal order (section IV).

II. Cultural analysis, metaphor and the imageries of project and system

The American constitutional scholar Paul Kahn is famous for having articulated a distinctive methodology of studying law, which he calls the cultural study of law.[6] According to Kahn, law is not only an expression of culture, but offers itself a distinct way to imagine, understand and give meaning to the world. Understanding law as culture means to comprehend law "as an autonomous form of understanding the social".[7] In this sense, law offers a way of perceiving events and actors and creates a framework through which one can comprehend the world. As Kahn puts it, law offers "a way of organizing a society under a set of beliefs that are constitutive of the identity of the community and of its individual members".[8]

A cultural study of law thus approaches law *as if* it is a culture and in doing so understands law as "the imaginative construction of a complete worldview" with the aim to uncover "its founding myths, its necessary beliefs, and its reasons that are internal to its own norms".[9] Law is always embedded in a web of narratives and conceptual structures through which it is rendered intelligible and these conceptual webs can be made explicit. Throughout his work, Kahn has identified the ways in which American legal discourse is structured by different "conceptual worldviews" and different "conceptual models of order".[10] To render these models explicit, Kahn identifies grand structural metaphors which offer different explanations of law as a phenomenon and structure the way in which law is imagined and talked about. As Kahn himself has argued at the core of the meaning-making process of law "we find the uses of metaphor".[11]

Etymologically speaking the word metaphor stems from the Greek "*meta*" and "*phero*" and means "to carry over". Metaphor as a figure of speech is thus, to follow a well-established definition, a device of "understanding and experiencing one kind of thing in terms of another".[12] Among linguists and language philosophers it is widely accepted that metaphors are more than merely a style figure or a rhetorical flourishing, but rather play an active role in the structuring of human thoughts. In the seminal study *Metaphors we live by* Lakoff and Johnson have argued that human thought processes are largely metaphorical and that our conceptual system is "metaphorically structured and

[6] P Kahn, *The Cultural Study of Law* cit.
[7] D Bonilla Maldonado, 'The Cultural Analysis of Law: Questions and Answers with Paul Kahn' (2020) GJL 285.
[8] P Kahn, *The Cultural Study of Law* cit. 8.
[9] *Ibid*. 1.
[10] See for example in P Kahn, *Legitimacy and History* (Yale University Press 1993).
[11] P Kahn, *The Cultural Study of Law* cit. 66.
[12] G Lakoff and M Johnson, *Metaphors We Live By* (University of Chicago Press 2003) 5.

defined”.[13] Metaphors help to understand one things in terms of another, thereby acting as “the principal vehicle of understanding”.[14] Metaphors rely on the existence of similarities between things and concepts to create understanding between the conceptual structure of a source domain and another domain. Thereby they help to create analogies previously not recognised and in doing so are able to bring a different perspective to a concept or conceptual domain. Metaphors are thus principally a conduit to increase understanding and intelligibility.

Beyond being a tool to create meaning and understanding, however, a metaphor is also a way to exert power because “it colors and controls our subsequent thinking about its subject”.[15] Metaphors structure the way we think about a certain concept in terms of other concepts, but it does so in a partial way. Metaphorical structuring allows on the one hand to highlight certain aspects of a concept, but inevitably this means metaphors “that allows us to comprehend one aspects of a concept of in terms of another [...] will necessarily hide other aspects of the concept”.[16]

Metaphors thus simultaneously *highlight* and *hide* aspects of concepts and it is in this way that they structure the legal imagination by simultaneously highlighting and hiding specific aspects of law.

In his most recent work, *The Origins of Order*, Kahn has identified two grand metaphors that structure the American legal imagination: *project* and *system*. The difference between these imageries can be captured in a set of oppositions, such as law as made versus law as discovered, self-creation versus immanent order, narrative versus structural analysis and mechanic versus organic metaphors.[17] Together these grand metaphors form an expression of the "chicken-egg" problem regarding the creation of legal orders that Pauline Westerman identifies in her contribution to this special issue.[18]

Kahn's view, the imagery of project “moves in a pattern of ends, plans and ownership”.[19] A project is always guided by an idea or a telos: there is an underlying principle, notion or thought which explains why the project is being undertaken and which the project tries to realise. Moreover, it is based on a plan and its success can be measured in terms of design and execution. Finally, a project is always attributable to an author: “[p]rojects don’t exist absent commitments to the ideas that define those projects”.[20] Kahn argues that at the time

[13] *Ibid*. 6.

[14] *Ibid*. 160.

[15] SL Winter, ‘The Metaphor of Standing and the Problem of Self-Governance’ (1988) Stanford Law Review 1383.

[16] G Lakoff and M Johnson, *Metaphors We Live By* cit. 10.

[17] P Kahn, *Origins of Order* cit.

[18] P Westerman, ‘Weaving the Threads of a European Legal Order' (2023) European Papers www.europeanpapers.eu 1301.

[19] P Kahn, *Origins of Order* cit. 16.

[20] *Ibid*. 15.

of the American revolution, constitutional law was imagined as a revolutionary project authored by the citizens with the aim to realise the principle of self-government.

Kahn also shows how this understanding gradually gave way to a systemic understanding of constitutional law with the common law at its core. As a result, constitutional law was no longer thought to be authored by the people, but rather to be a system governed by a set of principles inherent to the law itself. The imagery of system is markedly different than that of project. Whereas a project "is an idea external to the acts constitutive of the project [...] a system is striving to maintain an immanent principle of order".[21] From a systemic perspective, law has no author and does not appeal to the realisation of a transcendental principle that is external to the system itself (self-government), but rather realises the principle in an immanent fashion, *i.e.* through its continued existence. The common law does exactly this: it operates according to its internal logic and judges try to "discover" legal rules derived from custom, precedence, and legal principles.

In the *Origins of Order*, Kahn spells out in detail the ramifications of this shift in the legal imagination for questions about standards of legitimacy and democracy, appropriate forms of legal reasoning and the understanding of the proper role of Courts within the American political system. It is important to emphasise that for Kahn neither of these imageries are better reflections of the "reality" of US constitutional law. Rather they are competing frames through which the law is understood, and legal interpretation takes place, structuring the way in which law is imagined and talked about. In Kahn's words, "project and system compete as ways of imagining the world and our place in it".[22]

III. Autonomy and project and system in EU law

The imageries of project and system help to understand how the ECJ imagines legal integration. From the perspective of project, EU law is an instrument that is used to realise the objectives the EU pursues and the values on which the EU is founded. From a systemic understanding, in contrast, the EU legal system is perceived on its own terms. The ECJ's projects has been to promote the EU legal order qua system (see section III.1). This commitment manifest itself in the language EU legal scholars and judges adopt, relying on either mechanic or organic metaphors (section III.2). The principle of autonomy, finally, can be understood as expressing the Court's project to create a legal system, in which autonomy operates as the immanent principle of EU legal order (section III.3).

III.1. The EU legal order as the ECJ's project to create a system

Whereas Kahn argues that the American legal imagination moved from the imagery of project (constitutionalism) to an understanding of law as system (common law) over the

[21] *Ibid*. 17-18.
[22] *Ibid*. 21.

course of more than a century, in the context of the EU it is more appropriate to say that this shift occurred almost immediately. From the beginning of the integration process, both the ECJ and EU legal scholars have framed the project of European integration in systemic term. Conceptualising EU law as constituting a single, whole, unified legal system that operates according to its own principles of order was seen as necessary to pursue the project of European integration. This systemic vision of EU law allowed the Court to decentre the original authors of the project – the Member States – and move the project forward with reference to the systemic requirements of EU legal order. By imagining the EU legal order as *system* the Court itself became the author of the project of European integration.

This is not how legal integration is commonly framed. Economic objectives and shared values, not systemic requirements, are seen as underpinning the EU legal order. In a fascinating article Azoulai has shown how the narrative of integration through law has traditionally been accompanied by a vision of EU law as pursuing a telos or expressing an ethos.[23] This is the story told in much of EU legal scholarship, where it is argued the Court initially relied on teleological reasoning to realise the objectives the EU pursues but now has a constitutional framework in which " the values on which the EU is founded are placed before its objectives".[24] The idea is thus that the EU started out as a functional entity but is known developing "towards what in German is known as an objektive *Wertordnung*, ie 'an objective order of values'" and hence becoming a constitutional polity in its own right.[25]

Of course, such a vision is challenged by those who continue to argue that the EU continues to primarily pursue functional purposes.[26] Chalmers, for example, has argued that EU law sets out a vision of human association based exclusively around shared or common activities" as a consequence of which there is "no EU legal vision of collective being as a social form, a notion of society".[27] Building on Oakeshott's distinction between *universitas* and *societas*, Walker similarly holds that the EU legal order can best be conceptualized as a *universitas*: an enterprise association based on the pursuit of a set of collective purposes, most notably economic prosperity through the establishment of a common market.[28] On this view, despite the rhetoric of constitutionalism, the EU thus continues to be a functional entity.

Beyond these competing understandings of the EU as functional entity or constitutional polity, there exists a different way to understand EU law, namely in systemic terms. From this perspective, the *project* of European integration is not measured in economic output or in terms of its commitments to values, but rather is

[23] L Azoulai, '"Integration through Law" and Us' (2016) ICON 499.

[24] J Larik, 'From Speciality to a Constitutional Sense of Purpose: on the Changing Role of the Objectives of the European Union' (2014) ICLQ 11.

[25] *Ibid.* 17.

[26] T Isiksel, *Europe's Functional Constitution* (OUP 2016).

[27] D Chalmers, 'The Unconfined Power of European Union Law' (2016) European Papers www.europeanpapers.eu 415–416.

[28] N Walker, 'The Theoretical Foundations of EU Law' in C Kilpatrick and J Scott (eds), *Contemporary Challenges to EU Legality* (Oxford University Press 2021) 27–28.

understood as the creation of a legal *system*. This systemic understanding is already present in the foundational case law of the Court. The ECJ has explicitly framed the project of European integration in terms of the creation of a legal order. In the *Van Gend en Loos* judgement, the ECJ declared that the European Economic Community (EEC) "constitutes a new legal order of international law".[29] In *Costa v ENEL* the Court slightly changed the wording, stating the "EEC Treaty has created its own legal system [in French: *l'ordre juridique*]".[30] Much of the debate about these judgements has focused, and continuous to focus, whether EU law is truly "new" or whether it should be seen as a form of international law. Perhaps, however, the true genius of the Court laid in the fact it framed EU law in systemic terms, namely as a "legal order".

In his contribution to this *Special Section*, Eleftheriadis draws attention to the systemic understanding of EU legal order, which he terms the "structural" conception of EU law and which he rejects in favour of an "interpretative" understanding.[31] However, in contrast to Eleftheriadis I do not think that we can say that "the translation of the term *ordre juridique* to legal system was an unfortunate error", for the simple reason that all juridical actors involved in the early decades of the integration processed operated through a systemic imagination of EU law.[32]

From the beginning of the integration process legal scholars framed the significance of the Court's case law in those terms. At the 1963 Conference in Cologne on the 10th anniversary of the ECJ, various participants praised the Court's contribution to the integration process precisely for its systemic conception of EU law. Among those commentators we find Pierre Pescatore, who as an ECJ Judge is known for his significant contribution to the "constitutionalization" of the EU legal order. In his presentation, he praised the Courts many achievements, which he summarised as follows:

> "is it not true that, as jurists, we are all imbued with the need for a system, that is to say the need to bring a rational unity to the multiplicity of phenomena? Animated by this spirit, the Court of Justice makes its contribution [...] to the effort of integration which we have seen in action, for once, not at the level of economic facts, but at the level of the institutional structure and the legal order".[33]

Within the field of international law, it is well documented how the conceptualisation of the international legal order in systemic terms allowed legal scholars, judges, and bureaucrats at international organisations to partly emancipate international law from

[29] Case C-26/62 *Van Gend en Loos v Administratie der Belastingen* ECLI:EU:C:1963:1 para. 12.

[30] Case C-6/64 *Costa v E.N.E.L* ECLI:EU:C:1964:66, para. 593.

[31] P Eleftheriadis, 'The Primacy of EU Law: Interpretive, Not Structural' (2023) European Papers www.europeanpapers.eu 1255.

[32] *Ibid*.

[33] P Pescatore 'Der Gerichtshof als Verfassungsgericht/La Cour en tant que juridiction fédérale et constitutionnelle' in *Zehn Jahre Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften* (Carl Heymanns Verlag 1965) 533 [own translation from French].

the states. As Benvenisti notes, the effect of framing international law as a system allowed courts "to develop international law beyond the intention of governments".[34] This is the case because, it judges were no longer limited to interpret the law with reference to the text of the treaties and the intention of the treaty signatories, but could also draw on "the basic principles of the system and its underlying norms".[35] It was precisely by copying this strategy that EU law distanced itself from the international legal project. Vice-versa, it is the continued commitment of international legal scholars to this project that underpins their resistance against the systemic understanding of the EU legal order.[36]

It could thus be said that the *project* pursued by the ECJ is the creation of a legal *system* of which the ECJ is the author. Consequently, European integration is envisaged not only as the realisation of the objectives of art. 3 TEU and the values of art. 2 TEU, but also as the creation and maintenance of the EU legal order qua legal system. This perspective is not so much concerned with EU law based on what it *does*, but on the basis of what it *is* (namely a system). In doing so, the Court has developed a set of legal principles which make up the architecture of the EU legal order. This process is now generally known as the “constitutionalization” of the EU legal order, but if we strip down the constitutional language, what remains is a process of legal system building. This is how the Court describes the development of EU law in Opinion 2/13 where it states the essential characteristics of EU law (the principles of primacy, direct effect, and autonomy) “have given rise to a *structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States*, and its Member States with each other which are now engaged, as is recalled in the second paragraph of Article 1 TEU, in a ‘process of creating an ever closer union among the peoples of Europe’”.[37]

The language the Court uses here is very revealing: the essential characteristics of EU law "*have given rise* to a structured network of principles". The Courts adopts a highly systemic view of EU law, in which these principles simply derive from what the necessities of the EU legal system dictate. An example of this systemic reasoning is, for example, found in the development of general principles of EU law by relying on a deductive method that focuses on what is “inherent in the system of the Treaty” or what can be discerned “in the light of the general system of the Treaty”.[38] In developing this method the ECJ frames legal questions not from in light of the values on which the EU is founded

[34] E Benvenisti, 'The Conception of International Law as a Legal System' (2007) German Yearbook of International Law 396.

[35] *Ibid*.

[36] This is well illustrated by Koskenniemi's summary of the *Mox Plant* judgement: "The European project, the [ECJ] is saying, enjoys precedence over the international project." see M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) EJLS 9.

[37] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 167.

[38] Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1996:79 para. 31 and joined cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428 para. 35.

or from the objectives of European integration to be achieved, but rather from the perspective of *the requirements of the legal system itself*.

This systemic orientation is also visible in what Lasser has identified as the meta-teleological reasoning of the Advocates General and the ECJ. In fact, the denominator "meta-teloi" is somewhat misplaced, because the *teloi* do not refer to the objectives pursued by the integration project, but instead develop and maintain the EU legal system qua legal system. This is evident from the objectives Lasser has identified in his analysis of the ECJ's case law: effectiveness, uniformity, legal certainty, and judicial protection. These teloi are distinct from the objectives pursued by European integration, but instead are "broadly systemic meta-purposes" which underpin the ECJ's judicial reasoning with reference "to the purposes, values, or policies that should motivate the EU *legal system* if it is to be a proper *legal order*".[39]

From a legal point of view, this systemic view of EU law is presented as necessary to pursue the objectives of European integration. It is for this reason that EU law has famously been described as both as an instrument and an end in itself. In the introduction to the Integration Through Law volumes (ITL), Cappelletti, Seccombe and Weiler described law as both the agent and object of integration, meaning they perceived law both as the instrument to achieve the objectives of integration, but also as the goal of integration, each of these elements supporting each other.[40] Walker has even argued that EU law can be said to be the *primary* agent and object of integration, because the "core technique of integration could not be to offer law as an instrument of political will backed by force, thereby treating law as a *secondary* and derivative *agent* of political accomplishment".[41] As the object of integration "law *itself* has often been projected as a prominent mark and symbol of […] community at the EU level". Walker thus argues EU law creates *self-signifiers*: legal constructs such as the Single Market, the Area of Freedom Security and Justice (ASFJ), Economic and Monetary Union (EMU) are "pointing to the significance of their own achievement, rather than being merely or mainly of secondly and derivative import in signifying other and prior cultural features of the polity, as is often the case with polity-evocative legal symbols in the national context".[42]

The same could be said about the legal order as a whole, which from the perspective of the ECJ serves as the ultimate self-signifier; representing the success of European integration as such. Illustratively is that the Court in its recent judgement C-156/21 *Hungary v Parliament and Council* explicitly spoke about the identity of the European

[39] M Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford University Press 2009) 358.

[40] M Cappelletti, J Weiler and M Seccombe, *Integration through Law: Europe and the American Federal Experience* (Walter de Gruyter 1986) 15.

[41] N Walker, 'The Theoretical Foundations of EU Law' cit. 38.

[42] *Ibid*. 40.

Union “as a common legal order”.[43] The political project of European integration is thus framed as the creation and maintenance of a legal order and whenever the unity of that legal order is under threat, the integration project itself is deemed to be at stake.

III.2 The EU legal order as construction and body

The understanding of European integration as the project to create a legal system can be observed in the language judges and legal scholars use to talk about the EU legal order. From the perspective of project, the ECJ is presented as the author of the EU legal order and the language adopted revolves around the metaphor of “construction”. Whenever a systemic perspective is adopted, the EU legal order is framed as a "body" through use of organic metaphors. The metaphor of construction emphasises that EU law has an author – namely the Court – whereas the metaphor of "body" indicates that EU law is a self-sufficient and complete system that is governed by its own internal principles of order and therefore has no author.

When conceiving of the EU legal order as a project, the role the ECJ is framed as one of “building the European Union”, to quote the title of the *liber amicorum* published in honour of former Judge José Luís da Cruz Vilaça.[44] The Court is thus seen as the author of the EU legal system. This conception is deeply embedded in EU legal discourse, as noted by the political theorist Luuk van Middelaar, who has observed how since the beginnings of the integration project lawyers have invoked the concept of ‘construction’ to render intelligible the role of law in integration.[45] In legal discourse EU law is frequently cast as the “instrument"[46] and literally treated as a *tool* to bring about European integration. It is not a coincidence that Koen Lenaerts, the current president of the Court, describes the Court’s *modus operandi* as the “stone-by-stone” approach, meaning the incremental approach through which the court is “building of a solid edifice”.[47]

The EU legal order, generally, is described as the “judicial architecture”, the “structure” or the “edifice” of the EU and the process of constitutionalisation is frequently described – to quote from French – as the edification (*l’édification*) of the EU legal order.[48] These construction-related metaphors reveal how judges and legal scholars see the ECJ as the principal author of the EU legal order and how they consciously engage in a project of order building. In stark contrast, to the US, within the context of the EU the

[43] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 232.

[44] K Lenaerts, N Piçarro, F Rolin, C Farinhas and A Marciano (eds), *Building the European Union: The Jurist’s View of the Union’s Evolution* (Bloomsbury Publishing 2021).

[45] L Van Middelaar, *Passage to Europe* (Yale University Press 2013) 6.

[46] See for example M de Wilmars, ‘La jurisprudence de la Cour de justice comme instrument de l’intégration communautaire’ (1976) Cahiers de droit Européen 10.

[47] K Lenaerts, ‘How the ECJ Thinks: A Study on Judicial Legitimacy’ (2013) Fordham Int’l LJ 1369.

[48] J Weiler, ‘The Transformation of Europe’ (1981) YaleLJ 2405; JL da Cruz Vilaça, ‘Le Principe de l’effet Utile Du Droit de l’Union Dans La Jurisprudence de La Cour’ in A Rosas, E Levits, and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (T M C Asser Press 2013).

"constitution" is not seen as authored by the people, but a product of a process of "constitutionalisation" in which the Court constructed the foundational principles of EU law. Illustrative in this regard is the recent contention by Judge Lycourgos that the "constitutionalisation process [...] now seems complete, the Court expressly referring to the Union's 'constitutional framework'".[49]

Moreover, law is thought of not only to *bind* the Member States and citizens in a legal sense, but also to *bond* them together. As the title of the inaugural lecture the current Dutch Judge at the ECJ: *the judicial mortar of the Union.*[50] The message is clear: EU law is what holds the EU together and forms the very expression of integration.

When considering EU law as system, however, mechanical metaphors are replaced for organic ones and as a result EU laws are no longer *made* but simply *discovered*. Whereas construction metaphors highlight the role of the Court, natural metaphors hide all agency on behalf of judicial actors. This language could be described as a form of naturalization, which is the process that occurs when "contested arrangements may be made to appear obvious and self-evident, as if they were natural phenomena belonging to a world out there".[51]

This is the perspective adopted, for example, in the literature on general principles, which are described as derived from the general scheme of the Treaties. Bodily metaphors are deployed to emphasise how general principles are an inherent part of the whole of EU legal order - they are not "constructed" by judges, but simply an inherent part of the "body" of EU law. From this perspective, "the superstructure of the EU legal order is treaty-based and relatively *skeletal*".[52] As a consequence, "it was often up to the CJEU to fill in the general framework, provide protection where necessary, and generally *breathe life into the bare bones of the Treaties".*[53] Resultingly, the discovery of general principles has led to "inflation of the *size and shape* of the EU legal order".[54] This is not a form of judicial activism, however, since this development of general principles are "in line with the *animating logic* of *Van Gend en Loos* and *Costa v ENEL*. They are of the *same blood* as those foundational judgments".[55] General principles thus simply have the role to help "systematising *the vast body of norms* into a coherent whole".[56]

[49] C Lycourgos, 'The Intersection between the Uniform Application of EU Law and the Limitation of Sovereign Rights in the Jurisprudence of the CJEU' in K Lenaerts, N Piçarro, F Rolin, C Farinhas and A Marciano (eds), *Building the European Union: The Jurist's View of the Union's Evolution* (Hart Publishing 2017) 6.

[50] S Prechal, *Juridisch cement voor de Europese Unie* (Europa Law Publishing 2006).

[51] S Marks, 'Big Brother is Bleeping Us – with the Message that Ideology Doesn't Matter' (2001) EJIL 112.

[52] S Weatherill and S Vogenauer, 'Introduction' in S Weatherill and S Vogenauer *General Principles of Law: European and Comparative Perspectives* (Bloomsbury Publishing 2017) 1.

[53] A Cuyvers, 'General Principles of EU Law' in E Ugirashebuja, JE Ruhangisa, T Ottervanger and A Cuyvers (eds), *East African Community Law: Institutional, Substantive and Comparative EU Aspects* (Brill Nijhoff 2017) 219.

[54] S Weatherill and S Vogenauer, 'Introduction' cit. 2.

[55] S Weatherill, 'From Myth to Reality: The EU's "New Legal Order" and the Place of General Principles Within It' in S Weatherill and S Vogenauer (eds), *General Principles of Law* cit. 36.

[56] U Sadl and J Bengoetxea, 'Theorising General Principles of EU Law in Perspective: High Expectations, Modest Means and the Court of Justice' in *Ibid*. 41.

These organic metaphors thus convey the message how general principles are a natural and inherent part of the EU legal order and are thereby rendered immune from questioning or critique.

III.3. Autonomy as the immanent principle of EU legal order

The literature on the autonomy of EU law is replete with organic metaphors. From the perspective of the Court and its judges, autonomy is an expression of "the very *nature*" of EU law"[57] and part "of the very DNA" of the EU legal order".[58] The autonomy of EU legal order is thus not a constructed phenomenon, but an inherent part of EU law. Autonomy is thus *naturalised*, i.e. made part of the very description of EU legal order. This is well illustrated by the following quote from General Court Judge Da Silva Passos: "the concept of 'legal order' or 'law' already implies a certain degree of autonomy. Indeed 'law' can only exist if it results from an independent source and has independent normative character, and 'legal order' implies the existence of a system of law, having its own, exclusive source of law and, as a result, having its own principles, characteristics and rules".[59]

In similar fashion, Lenaerts et al. argue the autonomy of EU legal order separates EU law from both national and international law, meaning autonomy refers to "a legal order that has the capacity to operate as a self-referential system of norms that is both coherent and complete".[60] As such it offers a distinct systemic perspective of EU legal order, which is evident from the following four characteristics of the systemic imagination proposed by Kahn: *i)* autonomy portrays the EU legal order as an authorless system; *ii)* through autonomy the EU legal system tries to maintain itself; *iii)* autonomy emphasis the timeless origins of EU legal order and thus; *iv)* autonomy can be said to serve as the EU's immanent principle of order.

i) The concept of autonomy frames EU law as an authorless system. This means that autonomy cast the EU legal order as a system operating "independent of the motivating interests of those whose actions bring the system into being".[61] Since *Van Gend en Loos* and *Costa v E.N.E.L.,* the Court proclaimed the EU legal order as a "new legal order" on the basis of an analysis of "the spirit and *the general scheme*" of the Treaties and characterized the treaties as an "independent" (in French: *autonomé*) source of law.[62] In doing so, the Court downplayed the role of the Member States as Masters of the Treaty and implied

[57] See *e.g.*, case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 34 [my emphasis].

[58] K Lenaerts, J A Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' (2021) *Heidelberg Journal of International Law* 49.

[59] R Da Silva Passos, 'The Scope of the Principle of the Autonomy of the European Union Legal Order: Recent Developments' in K Lenaerts, N Piçarro, F Rolin, C Farinhas and A Marciano (eds), *Building the European Union* cit. 19.

[60] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 48.

[61] P Kahn, *Origins of Order* cit. 7.

[62] *Van Gend en Loos* cit. and *Costa v E.N.E.L.*cit. para. 594.

that state consent is not the foundation of EU law's authority, but rather that this authority resides in the legal framework itself.

More generally, the intention of the Member States hardly plays a role in the interpretation of the Treaties and the concept of autonomy is frequently invoked to counter-act the will of the Member States. This is particularly evident in the context of Opinion 1/91 in which the ECJ for the first time invoked the "autonomy of the Community legal order" to prevent the Member States from concluding an agreement with the member of the European Free Trade Association (EFTA).[63] In the aftermath of Opinion 1/91, scholars suggested that the autonomy of EU legal order lays down limits to the material revision of the Treaties and that the ECJ could invoke the principle of autonomy to declare Protocols to the Treaty.[64] It was thus argued the legal architecture of the EU legal order *on its own terms* takes precedence over the will of the Member States.

Such arguments illustrate how the concept of autonomy expresses the self-standing quality of the EU legal order, framing EU legal order as an authorless system that operates according to its own rules and emancipates the foundation of EU law from the will of the Member States. It is therefore not surprising that Eckes argues autonomy is "rooted in Kelsenian thought", because this concept allows the Court to hide the weak enforcement capacities of EU law and instead "invoke respect and normative force beyond factual compliance".[65]

In the literature, one frequently encounters the metaphor of "maturation" to explain how the role of autonomy has increased with the development of the EU legal order. EU law is thus framed not as being authored, but rather as having an inherent developmental dynamic that simply occurs "naturally" and of which the principle of autonomy forms an expression. It has been claimed, for example, how "[t]he rise of autonomy can be seen as *a sign of maturity of EU law* and increasing confidence on part of the Court".[66] Similarly, it is seen as a means to protect "the distinct characteristics of the *mature EU legal order* from interventions that originate beyond the Union".[67] Van Rossum has made a similar claim, linking the concept of autonomy to the way in which the ECJ delineates EU law from international law: "one could argue, *the more constitutionally mature* the EU becomes, the more protective the shield of the concept of autonomy in the face of the international legal order".[68]

[63] Opinion 1/91 *Draft Agreement on the creation of the European Economic Area* ECLI:EU:C:1991:490.

[64] For example, see DM Curtin, 'The Constitutional Structure of the Union: A Europe of Bits and Pieces' (1993) CMLRev 17, 62-66.

[65] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 5.

[66] T Tridimas, 'The General Principles of Law: Who Needs Them?' (2015) Les Cahiers de Droit 421.

[67] P Koutrakos, 'The Anatomy of Autonomy' cit. 92.

[68] JW van Rossem, 'The Autonomy of EU Law: More Is Less?' in RA Wessel and S Blockmans (eds), *Between Autonomy and Dependence* (TMC Asser Press 2013) 28.

ii) The concept of autonomy expresses the aim of the EU legal system to maintain itself *qua legal system* and protect it from interference from the Member States and other international regimes. Despite the controversies surrounding the meaning of the concept of autonomy, the general understanding is that the Court relies on this concept when it thinks the essential aspects of the EU legal system are at stake and need protection. As AG Maduro remarked in his Opinion in the famous *Kadi* ruling, the ECJ "seeks first and foremost, to preserve the constitutional framework created by the Treaty".[69] The ECJ has invoked autonomy, for example, to strike down international agreements that would exclude certain parts of EU law from the scope of national courts and hence locate these laws outside the reach of the preliminary reference procedure or to prevent Member States to use alternative methods of dispute settlement.[70]

iii) The concept of autonomy frames EU legal order as a timeless enterprise. Azoulai neatly captures this aspect of autonomy when stating "time does not matter in the construction of the EU legal order. It is autonomous; it has not and is not supposed to 'become autonomous'".[71] Autonomy thus stems directly from the presumption that EU law is different from both national and international law and that this has always been the case. Using a systemic imagery of law, it is thus not possible to explain *how* EU law has become autonomous, it simply must be to render EU legal system intelligible. When legal scholars talk about autonomy as an expression of the "maturation" of EU law, they also emphasize the timeless essence of autonomy, implying that the EU legal order is simply becoming what it already is. After all, as Arendt aptly observed, "the natural thing's existence is not separate but is somehow identical with the process through which it comes into being: the seed contains and, in a certain sense, already *is* the tree".[72]

iv) From the foregoing follows that the concept of autonomy can best be understood as the EU legal order's immanent principle of order. Autonomy is both "prior to the phenomena even though they have no existence prior to the events they inform" and describes "a reciprocal relationship [...] between parts and whole".[73] General Court Judge Kukovec claims exactly this when he argues autonomy should be understood as a "single, universal,

[69] Joined cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* ECLI:EU:C:2008:461, opinion of AG Maduro, para. 24.

[70] Opinion 1/09 *Creation of a unified patent litigation system* ECLI:EU:C:2011:123; case C-459/03 *Mox Plant* ECLI:EU:C:2006:345.

[71] L Azoulai, 'The Many Visions of Europe' in M Cremona and A Thies (eds), *The European Court of Justice and External Relations Law: Constitutional Challenges* (Hart Publishing 2014) 153.

[72] H Arendt, *The Human Condition: Second Edition* (University of Chicago Press 2019) 58. Also see Pernice who remarked that when the Court "spoke in Van Gend about a 'new legal order of international law', the *seed for developments* of great impact was already set". I Pernice, 'The Autonomy of the EU Legal Order - Fifty Years After Van Gend' in *50th anniversary of the judgment in Van Gend en Loos, 1963-2013 conference proceedings, Luxembourg, 13 May 2013.* (European Court of Justice 2013) 56.

[73] P Kahn, *Origins of Order* cit. 18.

organizing meta vision in terms of all that the Court does has significance".[74] This simply means that autonomy bridges the relationship between the individual judgements and the overall legal order, because it is through autonomy that the EU legal order sustains itself.

The fact that autonomy operates as the immanent principle of order of EU law is also exemplified in the circular forms of reasoning which the ECJ deploys when invoking the concept of autonomy. From the case law of the ECJ, we learn that autonomy "stems from the essential characteristics of the European Union and its law", which include "the fact that it stems from an independent source of law […] its primacy over the laws of the Member States, and […] the direct effect of a whole series of provisions".[75] This is a tautological and circular description: the autonomy of the EU legal order is the result of the essential characteristics, the first one of which is the fact that the EU law forms an independent, meaning: autonomous, source of law.

This circularity is also present in the recent characterizations of autonomy as a principle of EU law in the case law of the Court and some of the legal literature.[76] Lenaerts et al. have argued that in order for the EU legal order to be autonomous there can exist no normative gaps and therefore "the very nature of EU law requires the Court of Justice to 'find' the law […] by fashioning general principles of law where necessary".[77] If we are to believe the president of the ECJ, the principle of autonomy of EU law order is thus fashioned … in the name of the autonomy of the EU legal order. This circularity in the form of reasoning is exemplary of a systemic understanding of law, because in a system "the whole operates as a principle of order at every moment".[78]

IV. The autonomy of EU legal order and the tension between project and system

So far this *Article* has focused on an analysis of the autonomy discourse, relying on Kahn's distinction between *project* and *system* to argue that the principle of autonomy of EU legal order expresses a *systemic* imagination of EU legal order by with the ECJ pursues its own project. But how does these contrasting images of order manifest themselves in the case law of the ECJ on the concept of Autonomy? Most literature starts from the premise that maintaining the EU legal order is instrumental to the project of European integration, meaning the autonomy of EU legal order is compatible with and complementary to the pursuit of the objectives (telos) and values (ethos) of European integration. This view is premised on the assumption that all objectives, values and the system of EU legal order

[74] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' (2023) European Papers www.europeanpapers.eu 1403.

[75] Opinion 1/17 *CETA* ECLI:EU:C:2019:341 para. 109.

[76] Opinion 1/20 *Draft Modernised Energy Charter Treaty* ECLI:EU:C:2022:485 para. 47.

[77] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 78.

[78] P Kahn, *Origins of Order* cit. 18.

can be realized simultaneously and in complete harmony. Drawing on the work of the political philosopher Isaiah Berlin, we can describe this view as *monism* (not to be confused with *legal* monism) (section IV.1).

However, even if the systemic understanding of EU legal order is instrumental to the project of European integration, conceptually speaking it also *precedes* the understanding of European integration as a project. As a result, the autonomy of EU legal order will only express a commitment to the objectives and values of EU integration if these align with the preservation of the systemic integrity of the EU legal order. There thus exist no *necessary* relationship between the autonomy of the EU legal order and substantive value notions, but only a *contingent* one (section IV.2).

IV.1. Autonomy and the presumed compatibility of *telos*, *ethos* and system

The presumed compatibility between the objectives, values and system of EU law is most clearly expressed by ECJ judges in their extra-judicial writings. Exemplary in this regard are the writings of General Court Judge Kukovec. He claims autonomy expresses the "single, universal, organizing meta vision" of the ECJ. Drawing on Isaiah Berlin's distinction between the ideal-types of the Fox and the Hedgehog – "the fox knows many things, but the hedgehogs knows one big thing" – he argues that like a hedgehog the ECJ has a central vision which renders intelligible and coherent every single one of its judgements.[79] In Kukovec's view autonomy is thus "omnipresent" in the case law of the ECJ, ensuring the coherence and integrity of EU legal order at all times, even when the Court does not refer to the principle as such.[80] Kukovec claims that autonomy is the means to ensure "all the goals and values of the Treaty are realized, either individually or jointly".[81]

We can describe this vision of autonomy as value *monism*. This is the term Isaiah Berlin used to describe the belief that (1) all genuine questions must have one true answer; (2) there is a method to discover the true answer to any question and (3) when found, all true answers will be compatible with one another, forming a single coherent whole.[82] This is thus an ontological belief in the ultimate harmony of the universe. In fact, this is precisely the belief that Isaiah Berlin attributed to the Judge Kukovec' Hedgehog, namely the need to "relate everything to a single central vision, one system, less or more coherent or articulate in terms of which they understand, think and feel – a single, universal, organizing principle in terms of which alone all that they are and say has significance".[83]

[79] I Berlin, 'The Hedgehog and the Fox: an Essay on Tolstoy's View of History' in *The Proper Study of Mankind* (Vintage 2013) 436.

[80] D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1417 ff.

[81] *Ibid*.1437.

[82] I Berlin, 'The Decline of Utopian Ideas in the West' in H Hardy (eds), *The Crooked Timber of Humanity: Chapters in the History of Ideas* (Pimlico 2013) 25–26.

[83] I Berlin, *The Fox and Hedgehog* cit. 436.

This view is similarly found in the work of Judge Da Silva Passos, who suggest the principle of autonomy plays an active role in the recent cases on judicial independence and thus entails a commitment to the rule of law. In particular, he argued the development of the principle of judicial independence in *Associação Sindical dos Juízes Portugueses* [84] and *Commission v Poland*[85] forms "an extension of the scope and principle of autonomy of the EU legal order", which he described as "a rather logical and justified development of the ECJ case law".[86]

This understanding of autonomy is sometimes also articulated in the case law of the Court. In Opinion 1/91 the Court examined whether the system of courts proposed in the draft agreement between the EU member States and the EFTA states – which aimed to create an European Economic Area (EEA) including an EEA Court – would "undermine the autonomy of the Community legal order in pursuing *its own particular objectives*".[87] The Court observed that the objectives of the EEC go far beyond that of the EFTA agreement, referencing inter alia the objective to create an internal market and economic and monetary union, as well as art. 1 of the Single European Act which establishes that the Treaties are geared "to making concrete progress towards European unity".

In *Kadi*, the Court explicitly linked the autonomy of the Community legal system to fundamental rights protection, arguing that "measures incompatible with respect for human rights are not acceptable in the Community".[88] Subsequently, the Court found that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights".[89] This led the Court to conclude that it could review the implementation of UN Security Council resolutions.

In *Achmea*, as a final example, the Court linked the autonomy of EU legal order to mutual trust, arguing that Investor-State Dispute Settlement (ISDS) provisions in Treaties between EU Member States undermine the premise of mutual trust – the existence of and commitment to shared values codified in art. 2 TEU – and therefore also the autonomy of EU legal order. Seen in that light, it could be argued "that the principle of legal autonomy is ultimately derived and justified by the principle of mutual trust".[90]

In the legal literature, lastly, we find similar views. Legal scholars frequently claim that the autonomy of EU legal order not only has an institutional dimension, but also a substantive one. For example, it has been argued that the *Achmea* judgment enriches the

[84] Case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117.

[85] Case C-619/18 *Commission v Poland (Independence of the Supreme Court)* ECLI:EU:C:2019:531.

[86] R Da Silva Passos, 'The Scope of the Principle of the Autonomy of the European Union Legal Order' cit. 30.

[87] Opinion 1/91 cit. para. 31.

[88] *Kadi and Al Bakaraat* cit. para. 284.

[89] *Ibid*. para. 285.

[90] J Hillebrand Pohl, 'Intra-EU Investment Arbitration after the Achmea Case: Legal Autonomy Bounded by Mutual Trust?' (2018) EuConst 781.

concept of autonomy by forging a substantive link between the concept of autonomy and the value of the rule of law. Hindelang supports this claim by pointing to the frequent references to the *ASJP* judgement in which the ECJ for the first time articulated a definition of judicial independence and which since has been used as a benchmark to assess judicial reforms in Poland and Hungary. Accordingly, in *Achmea* the ECJ is "hinting towards a connection between the principle of autonomy of EU law and the rule of law", which could ensure that the "preliminary reference procedure and the daily administration of EU justice by Member States' courts is not corrupted".[91]

Likewise, it has been argued that in Opinion 1/17 autonomy protects a substantive core of democracy within the EU. In the judgement the Court refers several times to the need to protect the EU democratic process, which in the view of the Court cannot be undermined by the CETA dispute settlement bodies, as a result of which these cannot "call into question the level of protection of public interests determined by the Union".[92] For this reason it has been suggested that in this part of the judgement "the CJEU extends the application of the principle of autonomy from the structural/institutional dimension of the EU legal order to its substantive aspects".[93]

IV.2 The incompatibility of autonomy as project and system

These claims are premised on the idea that a commitment to the institutional dimension of EU legal order is inherently compatible with a commitment to the substantive objectives the EU pursues and the values on which the EU is founded. It thus expresses an ontological belief in the complete harmony of the EU's legal universe, corresponding to the vision of Isaiah Berlin's Hedgehog. Contrary to what Kukovec seems to imply, however, Berlin by no means favoured the perspective of Hedgehog over that of the Fox.[94] In fact, the opposite is true. Berlin claimed "the notion of the perfect whole, the ultimate solution, in which all good things coexist, seems to me to be not merely unattainable – that is a truism – but conceptually incoherent".[95] He explicitly warned that

[91] S Hindelang, 'Conceptualisation and Application of the Principle of Autonomy of EU Law – The CJEU's Judgement in *Achmea* Put in Perspective' (2019) ELR 390.

[92] Opinion 1/17 cit. para. 156.

[93] C Contartese and M Andenas, 'Opinion 1/17 and Its Themes: An Overview' (2021) European Papers www.europeanpapers.eu 625.

[94] Revealingly Kukovec misquotes Berlin stating "The fox knows many things, Berlin argues, 'but the hedgehog knows one big thing. The fox, for all his cunning, is defeated by the hedgehog's one defence'". D Kukovec, 'Autonomy: The Central Idea of the Reasoning of the Court of Justice' cit. 1404. In fact, Berlin writes "'The Fox knows many things, but the hedgehog knows one big thing.' *Scholars have differed about the correct interpretation of these dark words, which may mean no more than that* the fox, for all his cunning, is defeated by the hedgehog's one defence". Berlin never endorses the perspective of the hedgehog. See I Berlin, *The Fox and Hedgehog* cit. 436.

[95] I Berlin, 'The Pursuit of the Ideal' in *The Proper Study of Mankind* cit. 11.

utopian ideals "as guides to conduct [...] can prove literally fatal" because he deemed the very possibility of realizing ultimate harmony a fallacy.[96]

We thus ought to take seriously the perspective of the Fox, and with it the possibility that the objectives and values pursued by European integration, on the one hand, and the systemic needs of EU legal order on the other, cannot always be reconciled. In fact, the case law of the ECJ shows that the need to maintain the functioning and existence of the EU legal system on its own terms can clash with the objectives and values pursued by the EU. This section will therefore illustrate how autonomy will only express a more substantive telos or ethos, if and when these align with the preservation of the systemic integrity of the EU legal order. In other words, when the ECJ must make a decision it chooses *system* over *project*, or put differently, it first and foremost pursues its own project of European integration, namely the maintenance of EU legal system.

To illustrate the tension between an understanding of EU law as project and the Court's understanding of EU law as system, this section will contrast the *Kadi* judgement with Opinion 2/13, as well as *Banco de Santander* with *Getin Noble Bank*.[97] The former cases concern the relationship between autonomy and fundamental rights protection, the latter two cases concern autonomy and the principle of judicial independence. These cases illustrate how through the concept of autonomy the Court adopts a systemic understanding of EU legal order.

Among the cases in which the ECJ has invoked the concept of autonomy, the *Kadi* ruling stands out as the all-time favourite among legal scholars, because the ECJ ruled that the implementation of UN Security measures should be subjected to EU human rights scrutiny. This judgement is widely understood as an instance where the Court declared that "the protection of fundamental rights forms part of the very foundations of the Union legal order".[98] In *Kadi*, so it has been claimed, the ECJ "takes fundamental rights out of the scope of Balancing" and in doing so the Court established a "constitutional core" of EU law that cannot be affected by Member States or international law more generally.[99] Even critical voices of the Court recognise how *Kadi* should be welcomed for the way it effected an "institutional prioritization of rights protection within the EU's array of functions".[100] Similarly, Moreno-Lax, who has written highly critical about the Court's case law on autonomy, recognizes how in Kadi the "autonomy of EU law was granted an *axiological*, or value-loaded, dimension, because the ECJ framed autonomy as "the

[96] *Ibid*. 13.

[97] *Kadi and Al Bakaraat* cit.; Opinion 2/13 cit.; case C-274/14 *Banco de Santander* ECLI:EU:C:2020:17; and case C-132/20 *Getin Noble Bank* ECLI:EU:C:2022:235.

[98] J Kokott and C Sobotta, 'The *Kadi* Case - Constitutional Core Values and International Law - Finding the Balance?' (2012) EJIL 1116.

[99] N Lavranos, 'Protecting European Law from International Law' (2010) European Foreign Affairs Review 269.

[100] T Isiksel, 'Fundamental Rights in the EU after Kadi and Al Barakaat' 15 ELJ (2010) 571.

consequence of the (substantive) hierarchy of norms within the EU legal order".[101] Rather than an end in itself, autonomy was thus presented as a means "for the preservation of the (substantive) integrity of the most basic values of the system".[102]

Opinion 2/13, on the other hand, is almost universally decried among legal commentators, because here the concept of autonomy was invoked to prevent the accession of the EU to the European Convention on Human Rights (ECHR). In the judgement, the ECJ forcefully emphasised the special nature of EU legal order, referring to the fact the "EU has a new kind of legal order, the nature of which is peculiar to the EU, its own constitutional framework and founding principles" and reiterating the essential characteristics of EU law, primacy, direct effect and autonomy as the foundation of the legal structure of the EU.[103] Whilst the Court claimed that the rights laid down in the EU Charter of Fundamental Rights ('the Charter') are "at the heart of that legal structure", it also remarked how the autonomy of EU law "requires that the interpretation of those fundamental rights be ensured within the framework of the structure and objectives of the EU".[104]

These parts of the judgements, in particular, have been interpreted as the Court saying that fundamental rights objectives are to be subordinated to the achievement of the objects of integration, which the in the *Opinion* were defined as "the raison d'être of the EU itself".[105] Moreno-Lax and Ziegler, for example, claim that in the Court is too concerned with the securing the realisation of the objectives of art. 3 TEU, at the expense of the values in art. 2 TEU. As a result, they claim, the Court "inverses the constitutional hierarchy of norms, placing the objectives of EU integration above (and beyond) the values that motivate it".[106] Elsewhere Moreno-lax has argued that in Opinion 2/13 the ECJ "emancipates" the EU legal order from its founding values, the Court "suggesting the Union legal order should be considered autonomous 'for its own sake'".[107]

However, if we look beyond the tension between the telos (objectives) and ethos (values) of EU integration, then we can see how in both *Kadi* and Opinion 2/13 the autonomy of EU law the Court expresses *a structural bias towards the very structure of EU legal order* (system). What these two judgements illustrate is that there exists no *necessary* relationship between the autonomy of the EU legal order and the objectives and values the EU pursues, but only a *contingent* one.

[101] V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Hart Publishing 2019) 55.

[102] V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle' cit. 55.

[103] Opinion 2/13 cit. paras 158, 165–168.

[104] *Ibid*. paras 169–170.

[105] *Ibid*. para. 172.

[106] K Ziegler and V Moreno-Lax, 'Autonomy of the EU Legal Order – A General Principle? On the Risks of Normative Functionalism and Selective Constitutionalisation' in K Ziegler, P Neuvonen and V Moreno-Lax (eds), *Research Handbook on General Principles in EU Law* (Edward Elgar 2022) 241.

[107] V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle' cit. 71.

Even in *Kadi*, one might very well argue that autonomy is deployed not to establish an untouchable core of fundamental rights at the heart of the EU legal order, but to secure the position of the ECJ to safeguard its own position as the ultimate arbiter of fundamental rights review within the EU. This is particularly evident from the following passage in the judgment where the court notes how EU law "may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order, one of which is the protection of fundamental rights, *including the review by the Community judicature of the lawfulness of Community measures as regards their consistency with those fundamental rights.* [108]

This reading is supported by the argument of Gráinne de Búrca, who claims that the ECJ deliberately used the *Kadi* judgement "to emphasise the autonomy, authority and separateness of the EC legal order over international law".[109] Contrasting the approach of the ECJ with the approach by AG Maduro and the Court of First Instance, she shows how the Court relied on an "internally-oriented approach and a form of legal reasoning which emphasized the particular requirements of the EU's general principles of law and the importance of the autonomous authority of the EC legal order".[110] The outcome that reinforced the autonomy of EU law just happened to be also most conducive to human rights protection.

A second example of the tension between the structural tenets of EU legal order conflict with a commitment to values is the case law on the meaning of a 'court or tribunal' under art. 267 TFEU. Lenaerts and al. argued that the autonomy of the EU legal order enables the ECJ to interpret the Treaties and the Charter as a "living instrument", allowing the Court to take into account ongoing changes in the societies of the Member States, "whilst remaining faithful to the immutable values on which the entire EU is founded".[111] The autonomy of EU law is here thus presented as the means that enables the realisation of the values of art. 2 TEU. As the authors note themselves, "since the EU legal order is a self-referential system of norms that is both coherent and complete, the Treaties and the Charter must be read with sufficient flexibility for the EU legal system 'to endure for ages to come, and consequently to be adapted to the various crises of human affairs'".[112]

To support this claim, they refer to the judgement in *Banco de Santander* in which the Court tightened its definition of what constitutes a 'court or tribunal' in the meaning of art. 267 TFEU. This concept is treated as an "autonomous concept" under EU law, meaning that the ECJ has developed its own set of criteria to assess whether a national body should

[108] *Kadi and Al Bakaraat* cit. para. 128.

[109] G de Búrca, 'The European Court of Justice and the International Legal Order After *Kadi'* (2009) Harv Int'l LJ 7.

[110] *Ibid*. 44.

[111] K Lenaerts, JA Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 84–85.

[112] *Ibid*. 84.

be able to enter in a dialogue with the ECJ through the preliminary reference procedure. As various authors have pointed out, however, traditionally the Court has taken a very functionalist approach to this question, with the Court's main concern being to broaden access to the preliminary reference procedure to guarantee the uniform application of Union law and providing effective legal protection.[113] In one of these previous cases, the ECJ had, in fact, determined that the Spanish Central Tax Tribunal constituted a "court or tribunal" in the sense of art. 267 TFEU and therefore could send preliminary reference questions to the ECJ.[114] In *Banco de Santander*, by contrast, the Court ruled that this body does not meet the requirement of independence, because the irremovability of its member was not sufficiently guaranteed.

This change of direction was set in motion by the *Associação Sindical dos Juízes Portugueses*[115] judgement in which the Court read the principle of judicial independence into art. 19 TEU. The Court explicitly mentioned that the criterion of independence "must be re-examined notably in the light of the most recent case-law of the Court concerning, in particular, the criterion of independence which any national body must meet in order to be categorized as a "court or tribunal" for the purposes of art. 267 TFEU".[116] The implicit message is thus that in light of the democratic backsliding in several of the Member States of the EU the Court has formulated a stricter norm of judicial independence to ensure that only independent courts and tribunals can send a preliminary reference to the Court. In this way, Lenaerts et al. claim, *Banco De Santander* "not only reinforces the judicial dialogue between the Court of Justice and national courts, which is the 'keystone of the EU judicial system', but also the rule of law within the EU".[117]

However, in the more recent *Getin Noble Bank*[118] judgement, which also concerned the requirement of independence to qualify as a 'court or tribunal' in the meaning of art. 267 TFEU, the ECJ has quietly abandoned the more stringent test developed in *Banco de Santander.* In this case the ECJ accepted a preliminary reference from an irregularly appointed judge in the Polish Supreme Court. Before the ECJ handed down its judgement (but after the oral part of the proceedings) the ECHR found that the formation of the Civil Chamber in which this judge was sitting could not be considered a "tribunal established by law" in the meaning of art. 6 ECHR, because of several irregularities in the appointment process of the judge in question, which amounted to a manifest breach of the domestic law on the appointment of judges.[119]

[113] M Bonelli and M Claes, 'Judicial Serendipity: How Portuguese Judges Came to the Rescue of the Polish Judiciary' (2018) EUConst 638.

[114] Joined cases C-110/98 to C-147/98 *Gabalfrisa and Others* ECLI:EU:C:2000:145.

[115] *Associação Sindical dos Juízes Portugueses* cit.

[116] *Banco de Santander* cit. para. 55.

[117] K Lenaerts, J A Gutiérrez-Fons and S Adam, 'Exploring the Autonomy of the European Union Legal Order' cit. 87.

[118] *Getin Noble Bank* cit.

[119] EctHR *Advance Pharama SP. Z.O.O v. Poland* 1469/20 [3 February 2022] paras 359–350.

The ECJ, however, considered that it was not disputed that the Polish Supreme Court as an institution qualifies as a “court or tribunal” in the meaning of art. 267 TFEU, because the Commission and the Ombudsman only challenged whether the sitting judge which made the request for a preliminary reference satisfies the requirements of independence.[120] Moreover, it stated that when a request for a preliminary reference “emanates from a national court or tribunal, it must be presumed that it satisfies those requirements [...] irrespective of its actual composition”.[121] This presumption is not only tautological (in order to be considered a “court or tribunal” the requirements of art. 267 must have already been met, after all), but also leads the ECJ to abdicate almost all responsibilities in upholding the value of judicial independence. The Court noted that it was not for the ECJ itself to determine whether the preliminary reference was made in accordance with the rules of national law, instead positing the general presumption could only be rebutted when a final judgement handed down by a national or international court finds that the actual composition of the referring court is not an independent and impartial tribunal by law.[122]

As a result, *Getin Noble Bank* exemplifies the tension between the *systemic* view of EU legal order expressed in the concept of autonomy and the *project* of upholding the values on which the EU is founded. The Court explicitly considered that as the “keystone of the judicial system”, the preliminary reference procedure “has the object of securing uniformity in the interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties”.[123] At the same time, it considered how the presumption of compliance “applies solely for the purposes of assessing the admissibility of references for a preliminary ruling under art. 267 TFEU” and thus does not imply that the judge “necessarily satisfy the guarantees of access to an independent and impartial tribunal previously established by law, for the purposes of the second subparagraph of art. 19(1) TEU or art. 47 of the Charter”.[124] This means the Court is thus willing to receive questions from bodies that from the perspective of EU law are not able to apply the answers received from the ECJ, because they do not qualify as a ‘court or tribunal’ established by law. In the end, the Court is most concerned to maintain the systemic requirements of the preliminary reference procedure as a result of which “[t]he value of the rule of law is [...] giving way to the value of (‘judicial’) dialogue”.[125] The latter, of course, being a systemic requirement for the functioning of EU legal order more than anything else.

[120]*Getin Noble Bank* cit. para 68.
[121] *Ibid*. para. 69.
[122] *Ibid*. para. 72.
[123] *Ibid*. para. 71.
[124] *Ibid*. para. 74.
[125] F Paweł 'Drifting Case-law on Judicial Independence: a Double Standard as to What Is a ‘Court’ Under EU Law?' (13 May 2022) Verfassungsblog verfassungsblog.de.

IV. Conclusion

The concept of autonomy of EU legal order is not simply a legal rule but offers a window on a distinct way of imagining the EU legal order, namely as an authorless system that operates according to its own internal and immanent principle of order. Identifying the Court's imagination of the EU legal order as system, allows one to better understand some of the tensions in the case law of the Court where it invokes the concept of autonomy of EU legal order. This *Article* has shown there exist no *necessary* relationship between the autonomy of the EU legal order and the objectives and values it pursues, but only a *contingent* one. In distinction to the objectives and values of European integration, a commitment to EU legal order as system forms an independent motivating force in the case law of the Court which expresses its commitment to maintaining the EU legal system as an end in itself. This means that to speak about the 'substantive' dimension of the autonomy of EU legal order is somewhat of a category error, which conflates means and ends, project and system. Despite the attempt to frame EU legal order as one of harmonic unity, we can thus conclude that the Fox with all its cunnings defeats the Hedgehog's one defence.